



LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 385

[Docket No. Docket No. 21-CRB-0001-PR (2023-2027)]

Determination of Royalty Rates and Terms for Making and Distributing

Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges publish final regulations that set rates and terms for physical phonorecords, permanent downloads, ringtones, and music bundles applicable during the period from January 1, 2023 through December 31, 2027, for the statutory license for making and distributing phonorecords of nondramatic musical works.

DATES: Effective January 1, 2023.

FOR FURTHER INFORMATION CONTACT: Anita Brown, Program Specialist, (202) 707-7658, crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

On May 5, 2022, the Copyright Royalty Judges (Judges) received a Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations (Motion to Adopt Proposed Settlement 2) from National Music Publishers' Association, Inc. and Nashville Songwriters Association International (together, Licensors) and Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (together, Labels). The Licensors and Labels (together, Moving Parties) sought approval of a partial settlement of the license rate proceeding before the Judges titled *Determination of*

Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), Docket No. 21-CRB-0001-PR (2023-2027). The Moving Parties asserted that they had agreed to a settlement (Proposed Settlement 2) as to royalty rates and applicable regulatory terms relating to physical phonorecords, permanent downloads, ringtones, and music bundles presently addressed in 37 CFR part 385, subpart B (Subpart B Configurations). Proposed Settlement 2 would increase rates to 12 cents per track or 2.31 cents per minute of playing time or fraction thereof, whichever amount is larger, for physical phonorecords and permanent downloads for 2023 and include inflation-based adjustments for subsequent years of the rate period. Rates for ringtones would remain the same and the royalty rate for each element of a Music Bundle would be the rate required for physical phonorecords and permanent downloads or ringtones, as appropriate. Proposed Settlement 2 also addresses payment of late fees relating to Subpart B Configurations.

Previously, on May 25, 2021, the Judges received a Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations from National Music Publishers' Association, Inc. and Nashville Songwriters Association International and Sony Music Entertainment, UMG Recordings, Inc., and Warner Music Group Corp. (Motion to Adopt Proposed Settlement 1). The Licensors and Labels sought approval of a partial settlement of the *Phonorecords IV* proceeding (Proposed Settlement 1). Proposed Settlement 1 would have maintained the current rates for Subpart B Configurations and also addressed payment of late fees relating to Subpart B Configurations.

On June 25, 2021, the Judges published Proposed Settlement 1 in the Federal Register and requested comments from the public. 86 FR 40793 (June 25, 2021). Following receipt of comments from both participants and non-participants to the *Phonorecords IV* proceeding, including non-participant songwriter groups and

representatives who submitted comments in opposition, on March 30, 2022, the Judges published a notice that they were withdrawing the proposed settlement from consideration pursuant to section 801(b)(7). 87 FR 18342 (Mar. 30, 2022). The Judges' conclusion that Proposed Settlement 1 did not provide a reasonable basis for setting statutory rates and terms, and their withdrawal of Proposed Settlement 1 as a proposed rule, rested on a variety of interrelated factors regarding Proposed Settlement 1, chiefly that: (1) the subpart B mechanical rates that were first effective in 2006 would have remained unchanged; (2) potential conflicts of interest impacting the negotiations of Proposed Settlement 1; and (3) lack of transparency regarding a memorandum of understanding (MOU) that was contractually related to Proposed Settlement 1.

On April 4, 2022, the Judges received an Emergency Motion from Labels (Emergency Motion) seeking clarification regarding both litigation procedures going forward and any impact of the withdrawal of Proposed Settlement 1 beyond "participants that are not parties to the [settlement] agreement" 17 U.S.C. 801(b)(7)(A)(ii). With regard to the impact of withdrawal on various interested parties, the Labels urged that to the extent that the Judges might decline to adopt Proposed Settlement 1 as the basis for statutory terms and rates for anyone other than a participant, any such interpretation would raise a novel question of law that would need to be referred to the Register of Copyrights pursuant to section 802(f)(1)(B). The Labels moved for such a referral.

On April 28, 2022, the Judges referred a series of Novel Material Questions of Substantive Law to the Register of Copyrights pursuant to section 802(f)(1)(B) (Referred Novel Questions of Law).

On May 5, 2022, the Judges received a Motion from Labels seeking to withdraw their April 4, 2022 Emergency Motion (Withdrawal Motion). The Labels urged that in

view of the Motion to Adopt Proposed Settlement 2, it was no longer necessary for the Judges to address the matters raised in the Emergency Motion.¹

On June 1, 2022, the Judges published Proposed Settlement 2 in the *Federal Register* and requested comments from the public. 87 FR 33093 (Jun. 1, 2022).

Comments were due by July 1, 2022. The Judges received 18 comments from interested parties.² One participant, George Johnson (GEO) filed three comments opposing Proposed Settlement 2.³

Statutory Standard and Precedent

Pursuant to section 801(b)(7)(A) of the Copyright Act, the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding. This section states that the Judges shall: (1) provide an opportunity to comment on the agreement to non-participants who would be bound by the terms, rates, or other determination set by the agreement; and (2) provide an opportunity to comment and to object to participants in the proceeding who would be bound by the terms, rates, or other determination set by the agreement. *See* section 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for

¹ On May 10, 2022, the Judges transmitted a memo to the Register of Copyrights apprising her of developments relevant to the novel questions referred to the Register on April 28, 2022. The Judges noted that they anticipated the next steps would likely include publishing Proposed Settlement 2 for public comment. The Judges observed that, in light of Proposed Settlement 2, the referred questions may be moot.

² Upward Bound Music Company, Inc.; Production Music Association (PMA); Eugene Lambchops Curry; Associated Production Music (dba APM Music); Church Music Publishers Association (CMPA); The Association of Independent Music Publishers (AIMP); The 100 Percenters; Artist Rights Alliance; Songwriters of North America (SONA) and Black Music Action Coalition (BMAC); The Ivors Academy of Music Creators; Abby North, Erin McAnally, Chelsea Crowell, and Rosanne Cash; The American Association of Independent Music (A2IM); The Recording Academy; Christian L. Castle; Helienne Lindvall, David Lowery and Blake Morgan; Gwendolyn Seale; and Music Creators North America (MCNA) (submitted by MCNA, Songwriters Guild of America, Inc. (SGA), Society of Composers & Lyricists (SCL), and by the individuals Rick Carnes and Ashley Irwin (Independent Music Creators) and “endorsed by the Music Creator Groups Noted on the Appended Listing” (Alliance for Women Film Composers (AWFC), Alliance of Latin American Composers & Authors (AlcaMusica), Asia-Pacific Music Creators Alliance (APMA), European Composers and Songwriters Alliance (ECSA), Music Answers (M.A.), Pan-African Composers and Songwriters Alliance (PACSA), Screen Composers Guild of Canada (SCGC), Songwriters Association of Canada (SAC); Music Publishers Association of the United States (MPA).

³ GEO filed an Opposition and Motion to Deny Fraudulent Proposed Settlement 2 ... on May 27, 2022. On June 12, 2022, GEO filed Comments in Opposition and to Deny the Fraudulent Proposed Settlement 2....” On June 20, 2022, GEO filed Additional Comments in Opposition and to Deny the Fraudulent Proposed Settlement 2....”

participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.*

Regardless of the comments of interested parties or participants, the Judges are not compelled to adopt a settlement to the extent it includes provisions that are inconsistent with the statutory license. *See* Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan. 26, 2009) (error for Judges to adopt settlement without threshold determination of legality); *see also* Review of Copyright Royalty Judges Determination, 73 FR 9143, 9146 (Feb. 19, 2008) (error not to set separate rates as required under sections 112 and 114 when parties' unopposed settlement combined rates in contravention of those statutory sections).⁴

As the Register of Copyrights (Register) observed in the 2009 review of the Judges' decision, nothing in the statute precludes rejection of any portions of a settlement that would be contrary to provisions of the applicable license or otherwise contrary to the statute. 74 FR 4540. In the instance under review by the Register, the settlement agreement purported to alter the date(s) for payment of royalties granting licensees a longer period than section 115 provided. *Id.* at 4542. The Register also noted that nothing in the statute relating to adoption of settlements precludes the Judges from considering comments of non-participants "which argue that proposed [settlement] provisions are contrary to statutory law." *Id.* at 4540.

Summary of Non-Participant Comments

The comments of interested parties in this proceeding overlapped in significant aspects and are summarized as follows.

⁴ The Register found that a "paucity of evidence" in the record to support a determination of separate rates for the separate licenses "does not dispatch the ... Judges' statutory obligations." Review of Copyright Royalty Judges Determination, 73 FR 9143, 9145 (Feb. 19, 2008). The Register noted that the Judges have subpoena power to compel witnesses to appear and give testimony. *Id.*

Comments Generally in Support

The following commenters all express support for adoption of Proposed Settlement 2. Production Music Association (PMA); Associated Production Music (APM Music); Church Music Publishers Association (CMPA); The Association of Independent Music Publishers (AIMP); Artist Rights Alliance; Songwriters of North America (SONA) and Black Music Action Coalition (BMAC); The Ivors Academy of Music Creators; Abby North, Erin McAnally, Chelsea Crowell and Rosanne Cash; The Recording Academy; Music Publishers Association of the United States (MPA). The commenters express positive assessment of a 32% increase in rates under Proposed Settlement 2.

Upward Bound Music Company, Inc. is supportive of the proposed rates for 2023 but indicates a desire for specific adjustments for subsequent years of the rate period, as opposed to the inflation-based adjustments set forth in Proposed Settlement 2. Upward Bound Music Company, Inc. Comment at 1-2.⁵

Comments Generally in Opposition

The American Association of Independent Music (A2IM) asserts that the Judges should reject the new settlement, and withdraw the new proposed rule, for the same reasons that they rejected the initial settlement. A2IM at 1, 4-6. A2IM alleges that “the new settlement ‘freezes’ the original ‘penny rate’ structure.” A2IM at 1. A2IM states that the Proposed Settlement 2 rates, which are subject to an annual consumer price index (“CPI”) adjustment to the penny rate in subsequent years, were set without considering whether the rate or CPI adjustments are appropriate in light of the current market realities. *Id.* at 1-4. A2IM suggests that the Judges should not only reject the settlement but also “convene a process to solicit input from all interested stakeholders.” *Id.* at 6-7.

⁵ Unlike other comments, which did not focus attention on ringtones, Upward Bound Music Company, Inc. also proposed a rate for ringtones of 35 cents per ringtone across the rate period. No explanation for the proposed ringtone rate was provided.

While A2IM acknowledges that it should have filed a petition to participate in the *Phonorecords IV* proceeding, it then goes on to urge a variety of procedural reforms, which appear to require statutory amendments. *Id.* at 7-8.

Gwendolyn Seale asserts that the Proposed Settlement 2 rate of 12 cents for 2023 is too low, based on the totality of the record and the Judges' analyses in their determination not to accept Proposed Settlement 1. Seale at 1. Ms. Seale concludes that Proposed Settlement 2 only partially addresses the inflation issue by limiting the inflation calculation to 2021. She maintains that it would be illogical to base the inaugural rate for this cycle on 2021 inflation calculations. She adds that, if the Judges were only to take into account the inflation issue in determining a reasonable rate for the inaugural 2023 year, such rate should reflect the 9.1 cent rate indexed to as close as possible to 2023, which is currently 13.4 cents. *Id.* at 2-3. Ms. Seale adds that compositions that are subject to controlled composition clauses in private contracts may continue be licensed at a rate of approximately 9 cents in 2023. *Id.* at 3-5.

Songwriters Guild of America, Inc. (SGA), Society of Composers & Lyricists (SCL), and Music Creators North America (MCNA), and the individuals Rick Carnes and Ashley Irwin (Independent Music Creators) comment in opposition, asking the Judges to modify or decline to approve Proposed Settlement 2. Independent Music Creators at 1. Independent Music Creators posit that the 9.1 cent rate, the basis for the adjusted 12 cent rate in Proposed Settlement 2, had already lost much of its initial 2006 value by 2021. They maintain that the 2021 value was already 12 cents by early 2021, and by the time of introduction of Proposed Settlement 2 had further risen almost another 10% to 13.11 cents. They offer that their own calculations do not take into account further discounting of royalty rates by privately entered-into controlled composition clauses. *Id.* at 3. They add that the 12 cent proposal would inadequately account for inflationary increases as measured by the CPI that occurred in 2021 and 2022. *Id.* at 3-4.

Independent Music Creators question whether Proposed Settlement 2 represents the result of an arms-length negotiation amongst the Moving Parties. They then go on to point out what they perceive as inadequate opportunities for non-participants to take part in settlement negotiations. *Id.* at 4-5. Independent Music Creators go on to allege that the MOUs remain murky and that they may be utilized to circumvent the authority, rate determinations and rulings of the CRB. *Id.* at 6. Independent Music Creators include a proposal for an alternative set of adjusted subpart B rates, which they urge the Judges to adopt. *Id.* at 5-6.

Comments that are not clearly in support or in opposition to Proposed Settlement 2

Eugene Lambchops Curry does not pointedly address Proposed Settlement 2 or Subpart B activity, but instead appears to propose a rate of \$1.00 to \$3.00 per stream. Curry at 1-2.

Christian L. Castle, an attorney commenting on his own behalf, addresses proposed changes to statutory processes for CRB proceedings, which he believes will require Congress to act. He opines on proposals for alternative rate structures for Subpart B configurations put forward by non-participants, and alternatives for administration of the section 115 license. Castle at 1-5. He states that the Subpart B resolution reflected in Proposed Settlement 2 should not be derailed because of these structural issues that lawmakers no doubt will need to resolve. Castle at 2.

Songwriters Helienne Lindvall, David Lowery, and Blake Morgan (Writers)⁶ offer “a few minor repairs” to Proposed Settlement 2. They propose an alternative rate whereby calculation of the 2023 rate would be based on the 2006 CPI-U through the November 2022 CPI-U applied to the existing 9.1 cent rate, and corresponding adjustment methods for subsequent years of the rate period. Writers at 10-14. The Writers express criticism of the impact of controlled compositions clauses in the context

⁶ Writers’ comment was submitted by Christian L. Castle as Counsel.

of the section 115 licenses but take no position on the Judges' authority to reform controlled composition clauses or other provisions or practices in private contracts. *Id.* at 15-23.

The Writers express concern that there should be no undisclosed side deals as consideration for Proposed Settlement 2. They observe the Moving Parties' statement that the MOU at issue was executed a year ago, prior to the Moving Parties entering into renewed Proposed Settlement 2 negotiations and so was not consideration for any of the terms set forth in Proposed Settlement 2. They also note that the MOU apparently came into effect for the parties to it upon submission of Proposed Settlement 1 to the CRB, an event which occurred on May 25, 2021. The Writers note that because the MOU and the associated "late fee waiver" program has been disclosed to a degree both in and outside of the record for this Proceeding, the most recent MOU might not fall into the "undisclosed" category *Id.* at 24-25. The Writers also express concern with current processes for rate proceedings, which in their view exclude many voices that should have been heard in the rate-setting process and hopefully will be heard in future proceedings. *Id.* at 26-30.

Mr. Johnson's Opposition to the Settlement

Proceeding participant George Johnson (GEO) filed three documents opposing Proposed Settlement 2.⁷ GEO asserts that the totality of the record, self-dealing conflicts of interest, vertical integration, and other MOU problems have not changed in Proposed Settlement 2, and therefore, GEO submits that the Judges should also deny Proposed

⁷ On May 27, 2022, before the Judges published the proposed rule for comment, GEO filed an Objection and Motion to Deny Fraudulent Proposed Settlement 2 ... On June 12, 2022, after the Judges published the proposed rule for comment, GEO filed Comments in Opposition and to Deny the Fraudulent Proposed Settlement 2 ... (GEO Opposition), which GEO characterized as a re-submission of his prior filing so that his opposition will be considered as a formal response to the proposed rule. GEO represented that the June 12, 2022 GEO Opposition is exactly the same as the May 27, 2022 filing. On June 20, 2022, GEO then filed Additional Comments in Opposition and to Deny the Fraudulent Proposed Settlement ... (Additional GEO Opposition).

Settlement 2 for the exact same reasons the Judges declined to adopt Proposed Settlement 1, except for the “static” rate issue. *Id.* at 8.

GEO states that he did not think that it was appropriate to accept Proposed Settlement 2 since it would not only be premature, citing open motions regarding Proposed Settlement 1, namely the Emergency Motion and the Withdrawal Motion, and the Referred Novel Questions of Law. *Id.* at 4-5. GEO takes issue with the Moving Parties’ unwillingness to address desired terms in Proposed Settlement 2 and characterizes the initial 12 cent rate as a bare-minimum offer, which was made only because Moving Parties were forced to. *Id.* at 6.

GEO maintains that of the three primary reasons for the Judges’ refusal to adopt Proposed Settlement 1, the Moving Parties have only addressed the static rate, and that the Moving Parties have not addressed issues with potential conflicts of interest impacting the negotiations for Proposed Settlement 2 or a lack of transparency regarding a memorandum of understanding (MOU) that was contractually related to Proposed Settlement 1. *Id.* at 16-21.

GEO goes on to allege various perceived conflicts of interests by NMPA counsel and executives. *Id.* at 26-31. GEO then asserts that the MOU is unreasonable. *Id.* at 32, 34-35. GEO maintains that the MOU is a *quid pro quo*, representing consideration that was paid to the major publishers by the major labels in return for a static 9.1 cent rate in Proposed Settlement 1. GEO offers that side deals, like the MOU, are not appropriate when everybody does not participate, and especially when these side deal MOU’s are not disclosed. GEO also alleges that the MOU was formerly secret. *Id.* at 32. GEO adds his view that NMPA and NSAI do not represent American songwriters, as well as his view that they do not have a significant interest in this proceeding. *Id.* at 36. Finally, GEO takes issue with the role that controlled composition clauses, in private contracts, play in mechanical rates paid to songwriters. *Id.* at 38-39.

GEO's Additional GEO Opposition asserts that the initial 12 cent rate in Proposed Settlement 2 seems to be incorrectly calculated for retroactive inflation from 2006. He offers a calculation method that indicates a proper initial adjusted rate of approximately 14 cents. Additional GEO Opposition at 3-5. GEO then refers to a Clarification Motion that he submitted to the Judges on June 3, 2022, in which he appears to suggest that the proper rate for Subpart B may be arrived upon by retroactively indexing for inflation the rate of 2 cents per phonorecord that was set forth in the statute from 1909 to 1978. *Id.* at 6-8. GEO offers that the salary of the NMPA CEO should be instructive to the Judges' consideration of Proposed Settlement 2. *Id.* at 8-9. Finally, GEO addresses several matters that he advocates for in the proceeding, beyond consideration of Proposed Settlement 2. *Id.* at 10-11.

Judges' Analysis and Conclusions

Chapter 8 of the Copyright Act encourages parties to enter into settlement negotiations, ultimately the decision as to whether a contested settlement should be approved on motion is subject to the Judges' discretion, informed by the submissions of the Moving Parties and the commenters, and by the Judges' application of the law to the facts. Section 801(b)(7)(A) is clear that the Judges have the authority to adopt settlements between some or all of the participants to a proceeding at any time during a proceeding, so long the relevant parties are given an opportunity to comment and object. 17 U.S.C. 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any participant objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.* at 801(b)(7)(A).

The Judges provided the requisite opportunity for comment and received GEO's opposition as well as the above-noted comments for and against Proposed Settlement 2. Having considered these submissions in their entirety, the Judges find no persuasive legal

or economic arguments that convince the Judges to reject the proposed settlement reached voluntarily between the Moving Parties.

Only one *participant* in this proceeding, GEO, objected to the proposed settlement. As shown by the foregoing synopsis, however, GEO's objections did not come to the Judges in a vacuum. The statute requires publication of a settlement proposal and solicitation of comments from interested parties—parties who would be bound by the proposed rates and terms. Interested parties' comments are filed in the record of the proceeding and the Judges analyze those comments even though the Judges do not base rejection of a settlement solely on negative comments from non-participants. Non-participants who commented on Proposed Settlement 2 were not uniform in their views.

The Judges find no reason in the record to depart from their previous finding that Royalties from Subpart B Configurations are not inconsequential to the rightsholders. Subpart B Configurations are qualitatively different from the digital streaming configurations; consequently, the Judges can and do set separate rates for the Subpart B Configurations. Even though the physical and “permanent” download products are different in character from streaming uses, the Judges cannot and do not treat them with any less care and attention.⁸ Subpart B Configurations, in particular vinyl recordings, are a significant source of income for section 115 rightsholders. The royalties they generate should not be treated as *de minimis*, or as a “throw away” negotiating chip to encourage better terms for streaming configurations.

From the perspective of some independent songwriters and copyright owners, the proposed rates might seem inadequate, although even the participant that opposed

⁸ The Judges note that subpart B also addresses “ringtones” and that no participant offered a substantive objection to the rate for ringtones that is set forth in Proposed Settlement 2. As referenced above, one non-participant, Upward Bound Music Company, Inc. proposed a rate for ringtones of 35 cents per ringtone across the rate period. However, no explanation for the proposed ringtone rate was provided, nor was any substantive critique offered regarding the ringtone rate in Proposed Settlement 2.

Proposed Settlement 2, GEO, characterizes the rates as within the bare minimum. The Judges recognize that several comments proposed alternative rates that they prefer, as well as alternative methods for addressing inflation adjustments. The Judges also recognize that some comments take issue with existing procedures for participation in rate proceedings before the Judges. However, Proposed Settlement 2 is what is before the Judges for consideration, not alternative rates or proposals for alternative procedures.⁹ The fact is that the proposed rates and terms were negotiated on behalf of the vast majority of parties that historically have participated in Section 115 proceedings before the Judges. Those parties clearly concluded that the rates and terms were acceptable to both sides and, as addressed below, the negotiations occurred absent several of the aspects surrounding the Judges consideration of Proposed Settlement 1.

The Judges' analysis that led them to conclude that Proposed Settlement 1 did not provide a reasonable basis for setting statutory rates and terms – requiring them to withdraw Proposed Settlement 1 as a proposed rule – is distinguishable from their analysis of Proposed Settlement 2. The conclusion on Proposed Settlement 1 rested on a variety of interrelated factors, chiefly that: (1) the subpart B mechanical rates that were first effective in 2006 would have remained unchanged; (2) potential conflicts of interest impacting the negotiations of Proposed Settlement 1; and (3) lack of transparency regarding a memorandum of understanding (MOU) that was contractually related to Proposed Settlement 1.

In the current consideration of Proposed Settlement 2, the subpart B mechanical rates have been raised significantly from those that were first effective in 2006. In other words, the rates do not remain unchanged. They are not frozen, despite the fact that they retain a penny rate *structure*.

⁹ The Judges observe that a policy debate regarding procedures for participation in rate proceedings before the Judges remains an ongoing matter, but that any resolutions lie outside of the Judges' consideration of Proposed Settlement 2.

In the current consideration of Proposed Settlement 2, the MOU has been more prominently disclosed to the Judges and to the public. This is an important distinction from the Judges' consideration of Proposed Settlement 1, when the Judges found that they lacked complete knowledge of the implications of the MOU.¹⁰

Furthermore, as accurately noted by Writers' comment, the MOU is not consideration for Proposed Settlement 2. The relationship of the MOU to Proposed Settlement 1 was fundamentally different. In the case of Proposed Settlement 1, the MOU was conditional and was not effective until the parties to the MOU (the Moving Parties, *except* NSAI) submitted a motion to adopt Proposed Settlement 1. In the case of Proposed Settlement 2, the MOU was independently effective, as of May 25, 2021.

In the current consideration of Proposed Settlement 2, the issue of conflicts of interest remains. As stated in the Withdrawal of Proposed Settlement 1, conflicts are inherent if not inevitable in the existing composition of the negotiating parties. No party opposing the present settlement has presented persuasive evidence of misconduct, including any arising from the issue of conflicts of interest. The corporate relationships involving the record labels on the one hand and the publishers on the other alone do not suffice as probative evidence of wrongdoing. As addressed above, the details and effects of the MOU are not undisclosed. The Judges therefore do not find that conflicts present sufficient reason to doubt the reasonableness of the settlement at issue as a basis for setting statutory rates and terms.

¹⁰ When considering Proposed Settlement 1, the Judges found that they and the public lacked sufficient knowledge of MOU 4, in part because the MOU 4 related to the prior MOUs, by reference. Moving Parties assert that the prior MOUs were available and provided to the Judges through the Moving Parties' Comments in Further Support of the Settlement ... for Subpart B Configurations at 7 ("Comprehensive information about prior versions of the program, including copies of predecessor MOUs, is available online at <http://nmpalatefeesettlement.com/>"). In the case of Proposed Settlement 2, the *Federal Register* notice requesting comments from the public, the MOU and its predecessors were more prominently noted to the public. 87 FR 33904 FN 7 ("predecessor agreements to the MOU, some or all of which may be incorporated by reference in the current MOU, are publicly available online at <http://nmpalatefeesettlement.com/>"). Additionally, the Judges have inserted the relevant MOUs into the eCRB files for this proceeding (accessed from <http://nmpalatefeesettlement.com>). MOU4 is already incorporated into the record of this proceeding as Exhibit C to the Moving Parties' Comments in Further Support of the Settlement ... for Subpart B Configurations (Aug. 10, 2021).

The Judges do not conclude that the Proposed Settlement 2 agreement, reached voluntarily between the Moving Parties, fails to provide a reasonable basis for setting statutory terms and rates for licensing nondramatic musical works to manufacture and distribute phonorecords, including permanent digital downloads and ringtones (Subpart B Configurations). The entirety of the record before the Judges, including the arguments GEO and other commenters presented, is insufficient for the Judges to determine that the agreed rates and terms are unreasonable.

In making this finding, the Judges are not indicating that the particular method of adjusting for inflation in the settlement is superior to methods offered by parties that voiced their opposition to Proposed Settlement 2, or that Proposed Settlement 2 represents an approach to inflation that the Judges would have chosen after a fully contested proceeding. In making this finding, the Judges observe that the Moving Parties clarified that Proposed Settlement 2 was arrived upon in part to avoid costly and uncertain litigation, which would involve a number of disputed issues. Their inflation adjustment is but one of several provisions, and thus is bound-up with the entirety of the parties' negotiated compromises. In this context, the Judges have no reason to find that the inflation adjustment is unreasonable or should otherwise justify a rejection of the settlement.

The Judges also reviewed the proposed settlement with regard to whether any portions of the settlement would be contrary to provisions of the applicable license or otherwise contrary to the statute, pursuant to the Register's prior rulings. *See e.g.*, Review of Copyright Royalty Judges Determination, 74 FR 4537, 4540 (Jan 26, 2009). Upon such review, the Judges see no basis to conclude the settlement is contrary to law. Therefore, the Judges adopt the proposed regulations that codify the partial settlement.¹¹

¹¹ While the Judges recognize several commenters took issue with controlled composition clauses and other contractual terms that parties have voluntarily entered into, which affect how mechanical royalties are paid and may exacerbate the effect of an unreasonably low statutory rate, no commenter has established that the

The Judges adopt the proposed rates and terms industry-wide for Subpart B Configurations.

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

For the reasons set forth in the preamble, the Copyright Royalty Judges amend 37 CFR part 385 as set forth below.

PART 385— RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

2. In § 385.2 revise the introductory text of the definition of “Eligible Limited Download”, the definition of “Licensed Activity”, and paragraph (4) in the definition of “Sound Recording Company” to read as follows:

§ 385.2 Definitions.

* * * * *

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115 that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

* * * * *

Licensed Activity, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord

Judges have authority to affect such privately entered contracts. Furthermore, the Judges find that no pending motion or referred questions (which the Judges consider moot) provide a basis to refrain from adopting the settlement.

Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

* * * * *

Sound Recording Company * * *

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of a person identified in paragraphs (1) through (3) of this definition.

* * * * *

3. Revise § 385.10 to read as follows:

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, Permanent Downloads, Ringtones, and Music Bundles, in accordance with the provisions of 17 U.S.C. 115.

4. In § 385.11, revise paragraph (a) to read as follows:

§ 385.11 Royalty rates.

(a) *Physical phonorecords and Permanent Downloads—(1) 2023 rate.* For the year 2023, for every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 12.0 cents or 2.31 cents per minute of playing time or fraction thereof, whichever amount is larger.

(2) *Annual rate adjustment.* The Copyright Royalty Judges shall adjust the royalty rates in paragraph (a)(1) of this section each year to reflect any changes occurring in the cost of living as determined by the most recent Consumer Price Index for All Urban Consumers (U.S. City Average, all items) (CPI-U) published by the Secretary of Labor before December 1 of the preceding year. The calculation of the rate for each year shall be cumulative based on a calculation of the percentage increase in the CPI-U from

the CPI-U published in November, 2022 (the Base Rate) and shall be made according to the following formulas: for the per-work rate, $(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times 12\text{¢}$, rounded to the nearest tenth of a cent; for the per-minute rate, $(1 + (Cy - \text{Base Rate}) / \text{Base Rate}) \times 2.31\text{¢}$, rounded to the nearest hundredth of a cent; where Cy is the CPI-U published by the Secretary of Labor before December 1 of the preceding year. The Judges shall publish notice of the adjusted fees in the Federal Register at least 25 days before January 1. The adjusted fees shall be effective on January 1.

* * * * *

Dated: November 30, 2022.

David P. Shaw,
Chief Copyright Royalty Judge

David R. Strickler,
Copyright Royalty Judge

Steve Ruwe,
Copyright Royalty Judge

Approved by:

Dr. Carla D. Hayden,
Librarian of Congress.

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